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Supreme Court, U.S.
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No. 272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON MOTION TO DISMISS UNDER RULE 7, SUBDIVISION 3 OF THE GENERAL RULES OF THE SUPREME COURT OF THE UNITED STATES.

NOTICE OF MOTION, AFFIDAVIT, AND BRIEF FOR RESPONDENT IN SUPPORT OF MOTION.

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IN THE

Supreme Court of the United States

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*Notice of Motion to Dismiss Under Rule 7, Subdivision 3 of the General Rules of the Supreme Court of the United States.*

NOTICE OF MOTION.

To: Hon. Stanley Reed, Solicitor General of the United States of America, Attorney for Petitioner.

SIR:

PLEASE TAKE NOTICE that on January 8, 1935, the undersigned will move this Honorable Court, at a Term thereof to be held at the Supreme Court, in the United States Supreme Court Building, First Street N. E., Washington, D. C., for an order dismissing the writ of certiorari granted in the above-entitled cause, upon the ground that the United States Supreme Court lacks jurisdiction to pass upon the merits of the writ of certiorari, for the reasons asserted in the affidavit hereto annexed, as well as the accompanying brief, under Rule 7, sub-division 3 of the General Rules of the United States Supreme Court.

Dated, Newark, N. J., January 7th, 1936.

MINTURN & WEINBERGER,
Solicitors for Respondent,
60 Park Place, Newark, New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*On Motion to Dismiss.* *Affidavit.*

AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

HARRY H. WEINBERGER, being duly sworn, deposes and says:

I am a member of the firm of Minturn & Weinberger, attorneys of record for the respondent in the above-entitled cause.

Since the petition for the writ of certiorari to this court was granted by this court, certain grounds which were not urged in opposition to the petition, and which attack the jurisdiction of this court have occurred to your deponent, which your deponent seeks to bring to the attention of this court for the purpose of urging a dismissal of this cause for lack of jurisdiction.

This application is made under Rule 7, sub-division 3, of the General Rules of this court.

The following grounds, none of which have been advanced or presented in the brief in opposition to the brief of the petitioner for this writ, are respectfully urged in

support of this motion for a dismissal of this cause for the want of jurisdiction.

1. The order of June 4, 1935 (R. 325-6), complained of by the petitioner, is no adjudication of any of the rights of the petitioner, but adjudicates, if at all, the right of the Collector of Internal Revenue to intervene, and, as such, he is the only aggrieved party entitled to appear and prosecute.

2. The order of June 4, 1935 is purely an administrative order, concerning as it does merely the carrying out of the final decree of October 2, 1934 (R. 290-1), which had been entered eight months prior and which final decree was in no respect altered, modified or amended.

3. The petitioner contends that this cause is a pure admiralty cause, and, as such, the claim for the alleged tax could not properly be urged under the libel proceedings herein, and for that reason attempts to justify the failure to urge it in the cause. Nevertheless, the petitioner claims that the court, in entering the order of June 4, 1935 in this very admiralty cause, committed error by reason of depriving the government of its claim for the alleged tax. This is an anomalous contention.

4. The final decree in this cause was entered on October 2, 1934, and no appeal was ever taken from the said final decree by petition for writ or otherwise, and the said final decree has been conceded by the petitioner to be a valid and correct judgment in this cause. (See Government's Brief in No. 621, October Term 1934, at p. 7.) The time within which to appeal therefrom has long since expired. The order of June 4, 1935 did not adjudicate any substantive rights and was not a judicial determination upon which an appeal can be properly predicated.

5. There is no jurisdiction vested in the United States Circuit Court of Appeals, of an original nature, over a

tax claim such as was attempted to be asserted by the Collector in this cause.

For the aforesaid reasons, it is respectfully urged that this motion to dismiss be granted.

HARRY H. WEINBERGER.

Subscribed and sworn to before me this 7th day of January, 1936.

WILLIAM N. MARGOLIS,
An Attorney at Law
of the State of New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 272, October Term 1935.

UNITED STATES OF AMERICA, *Petitioner,* *vs.* FRANK RIZZO, Claimant of 146,157 Gallons of Alcohol.	*On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.*

BRIEF FOR RESPONDENT IN SUPPORT OF MOTION TO DISMISS UNDER RULE 7, SUBDIVISION 3, OF THE GENERAL RULES OF THE SUPREME COURT OF THE UNITED STATES.

POINT I.

The order of June 4, 1935 is not an adjudication of any of the rights of the petitioner, but adjudicates, if at all, the right of the Collector of Internal Revenue to intervene and, as such, he is the only aggrieved party entitled to appear and prosecute.

The only party aggrieved, if at all, is the Collector of Internal Revenue, who is not the petitioner.

> "An appeal cannot be taken from a decree by one who is not a party to the suit."
>
> (*Indiana Southern R. Co.* v. *Liverpool, L. & G. Insurance Co.*, 109 U. S. 168; 27 L. Ed. 895.)

> "No one but a party appearing in the lower Court can appeal from a decree."
>
> *William Bagley* v. *United States*, 5 Wall, 377; 18 L. Ed. 583.

"A judgment to be appealable must be final as to all of the parties and as to the whole subject matter and as to all the causes of action involved."

Collins v. *Miller*, 252 U. S. 364, 64 L. Ed. 616.

Louisiana Nav. Co. v. *Oyster Com.*, 226 U. S. 99, 101; 57 L. Ed. 138, 140.

POINT II.

This Court is without jurisdiction and should dismiss the writ of certiorari which was granted on October 14, 1935.

The order of June 4, 1935, complained of by the petitioner, United States of America, was purely an administrative order, concerning as it did merely the carrying out of the order of October 2, 1934 (R. 290-291), according to its true intent and purpose.

The case of *Wynkoop, Hallenbeck, Crawford Co.* v. *Thomas J. Gaines, Jr.*, 227 U. S. 4, 57 L. Ed. 391, is on "all fours" with our case, inasmuch as it was there held that a final order entered on June 22, 1911, from which no appeal was taken or petition to review filed, could not be attacked because an order was thereafter entered on August 3, 1911, for the only questions that remained and which were disposed of by the latter order were purely administrative, concerning as they did merely the carrying out of the order of June 22, 1911, according to its true intent and purpose.

The Court, by Chief Justice White, said:

"That the motion to dismiss must be granted is manifest from the statement we have made. Whatever may have been the nature of the original controversy presented by the intervention of the Wynkoop Company, the acquiesence of both parties in the order of June 22, 1911, settled that controversy, and the questions remaining were purely

administrative, concerning as they did merely the carrying out of the order according to its true intent and purpose."

POINT III.

The petitioner contends that this cause is a pure admiralty cause and, if that be so, the claim for the alleged tax could not properly be urged under the libel proceedings herein.

The attempt to urge, as the petitioner does in this admiralty cause, a claim which the petitioner admits could not be urged, because of the contention made by the petitioner that this is an admiralty cause, can scarcely be the basis for complaining of the order of June 4, 1935, which refuses to recognize the claim made by the petitioner in this admiralty cause.

See *"The Lottawanna,"* 20 Wall. 201, where the Court states:

> "Beyond doubt maritime liens upon the property sold by the order of the admiralty court follow the proceeds, but the proceeds arising from such a sale, if the title of the owner is unincumbered *and not subject to any maritime lien of any kind,* belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they vested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner." (Italics ours.) "Brown *v.* Lull, 2 Sumn. 443; Sheppard *v.* Taylor, 5 Pet. 675; The Europa, Bro. & Lush., pp. 87, 91; The Amelie, 2 Cliff. 448, 6 Wall. 30, 18 L. ed. 809."

POINT IV.

There is no ORIGINAL jurisdiction vested in the United States Circuit Court of Appeals of a tax claim such as was attempted to be asserted in this cause.

Under the Judicial Code, Title 28, Sec. 41, subdv. 5, the Districts Courts of the United States are vested with original jurisdiction over causes arising under internal revenues, customs and tonnage laws.

The only other court that has certain original jurisdiction over such matters is the Court of Customs Appeals.

The Circuit Court of Appeals has no original jurisdiction. Its jurisdiction is appellate, as limited and established by the act.

> *Whitney* v. *Dick,* 202 U. S. 132, 50 L. Ed. 963;
> *Kentucky* v. *Powers,* 201 U. S. 1, 35; 50 L. Ed. 633, 649.

In *United States* v. *Mayer,* 235 U. S. 55, 65; 59 L. Ed. 129, 134, Chief Justice Hughes states:

> "But the jurisdiction of the circuit courts of appeals is exclusively appellate (act of March 3, 1891, secs. 2, 6 (26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 549), Judicial Code, secs. 117, 128; Whitney *v.* Dick, 202 U. S. 132, 137, 138, 50 L. ed. 963, 965, 26 Sup. Ct. Rep. 584); and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power."

The application by the Collector of Internal Revenue was, in its nature, nothing more than a petition to intervene, the refusal by the Court being purely discretionary and, as such, not appealable.

> *Credits Commutation Co.* v. *United States,* 177 U. S. 311; 44 L. Ed. 782.

It is not amiss to point out the holding of this Court in *Martinez* v. *International Banking Corporation*, 220 U. S. 214, 55 L. Ed. 438, 443, where the Court states:

> "But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this Court to final judgments, is that cases should not be brought here by piecemeal through the medium of successive appeals.
>
> "The motion to dismiss the appeals in each of the cases is granted. Dismissed for want of jurisdiction."

For the afore-stated reasons, it is respectfully urged that the motion to dismiss this writ of certiorari be granted.

Respectfully submitted,

MINTURN & WEINBERGER,
Solicitors for Respondent.

LOUIS HALLE,
MILTON R. KROOPF,
SAMUEL I. KESSLER,
Of Counsel.